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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

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| DAYCO FUNDING CORPORATION,<br><br>Plaintiff and Appellant,<br><br>v.<br><br>TERI SCHNEIDER etc.,<br><br>Defendant and Respondent. | B196591<br><br>(Los Angeles County<br>Super. Ct. No. BC305665) |

APPEALS from a judgment and order of the Superior Court of Los Angeles County. Richard L. Fruin, Judge. Judgment affirmed; order reversed.

Marcus, Watanabe, Snyder & Dave, David M. Marcus and Amy J. Cooper for Plaintiff and Appellant.

Krane & Smith, Marc Smith and Ann Penners Bergen for Defendant and Respondent.

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Plaintiff Dayco Funding Corporation (Dayco) appeals from a judgment entered in favor of defendant Teri Schneider after a bench trial on Dayco's claim for specific performance on a purchase option provision in a residential lease agreement. On appeal, Dayco contends the trial court committed judicial misconduct and that its findings are not supported by the evidence. Schneider appeals from the trial court's post-judgment order denying her motion for attorney fees. We affirm the judgment in favor of Schneider and reverse the trial court's order denying her motion for attorney fees.[1]

## BACKGROUND

### I. Events Leading up to the Complaint.

In October 2001, Schneider placed an advertisement on the Westside Rentals website listing her single family dwelling (Property) for lease. Gene Moroz and Maya Konvisor responded to the advertisement.[2] On October 24, 2001, Moroz, Konvisor, and Schneider met at the Property and signed a two-year lease (Lease), commencing on November 1, 2001 and ending on October 30, 2003. The monthly rent was $1,550.

On June 10, 2003, Schneider informed Moroz that she intended to raise the monthly rent to $1,650. Moroz and Konvisor informed Schneider the next day that they intended to exercise their "option to purchase" the Property for $265,000, an option which Moroz and Konvisor claimed the parties agreed to when they initially signed the Lease. Schneider denied that such an option existed in the Lease and refused to sell them the Property. Moroz, Konvisor, and Mishele moved out of the Property at the end of the year.

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[1] We also grant Schneider's motion to augment the record with documents lodged in the trial court, but not included in the Clerk's Transcript.

[2] Konvisor has a daughter, Mishele Konvisor, who was eight or nine years old at the time. We will refer to the daughter as Mishele to distinguish her from Konvisor.

## II. The Complaint and Default Proceedings.

In November 2003, Moroz and Konvisor sued Schneider for specific performance and breach of contract. Schneider did not answer the complaint.

In January 2004, Moroz and Konvisor requested entry of default judgment against Schneider and mailed a copy of the request to the Property's address. Schneider did not respond to the request, nor did she appear at the June 14, 2004 default prove-up hearing.[3] On June 28, 2004, the trial court entered judgment in favor of Moroz and Konvisor for specific performance, permitting them to open escrow for the sale of the Property for the price of $265,000 less $100.00 for each month's rent paid until the escrow closed. The trial court denied their request for attorney fees.

Sometime in October 2004, the trial court appointed Samuel Ingham, a member of the county's Probate Volunteer Program, to investigate Schneider's mental competency pursuant to Evidence Code section 730.[4] In late November 2004, Ingham informed the trial court that authorities had involuntarily committed Schneider to a psychiatric facility earlier that month. The trial court raised concerns about Schneider's mental capacity at the time she signed the lease and at the time she was served with the complaint and subsequent default notices. The trial court then indicated its intention to set aside the default judgment unless Moroz and Konvisor would stipulate to waiving the six-month deadline for seeking relief under Code of Civil Procedure section 473. Their counsel agreed to waive the time limit and in January 2005, Schneider, who was now represented

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[3] Moroz was aware that Schneider lived inside the Property's converted garage, which was detached from the main dwelling. Moroz and Schneider shared a locked mailbox at the Property. Moroz claimed that Schneider had a key to the mailbox; Schneider claimed that she gave Moroz the only key and had no way of accessing the mailbox. At trial, Schneider testified that she never received any of the documents pertaining to the litigation sent to the Property's address.

[4] Evidence Code section 730 provides: "When it appears to the court, at any time before or during the trial of an action, that expert evidence is or may be required by the court or by any party to the action, the court on its own motion or on motion of any party may appoint one or more experts to investigate, to render a report as may be ordered by the court, and to testify as an expert at the trial of the action relative to the fact or matter as to which the expert evidence is or may be required."

by counsel through the assistance of Ingham, filed a motion to vacate the default judgment pursuant to Code of Civil Procedure sections 473 and 473.5.

On February 14, 2005, the trial court vacated the default judgment, permitted Schneider to answer the complaint, and set the matter for trial. In May 2005, Moroz assigned his interest in the litigation to Dayco for $37,000, making Dayco the plaintiff in the underlying action.[5] In October 2005, Dayco filed a "notice of election of remedies" whereby it agreed to pursue its first cause of action for specific performance and waive its second cause of action for breach of contract damages. Dayco's election of remedies effectively waived its right to a jury trial.[6]

## III. The Bench Trial.

There were two key issues at trial: the manner of preparation of the Lease and Schneider's mental capacity.

The Lease. The Lease is a two-page document entitled "Residential Lease Agreement." It is a standard pre-printed form lease with fill-in-the-blank lines for the monthly rent, the term of the lease, the security deposit amount and check number, and the names and signatures of the parties. There is no purchase option pre-printed in the Lease. Instead, in the blank space between pre-printed paragraphs 15 and 16, the following appears in typewriter font: "15A. Landlord hereby grants to Tenant an option to purchase the Property upon the terms and conditions set forth in para. 19." In the blank space between pre-printed paragraphs 19 and 20, the following appears in typewriter font: "Tenant shall give written notice of the exercise of the option to Landlord during the period from 4/30/03 to 10/30/03 (the "Option Period"). If tenant elects to exercise this

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[5] Also in May 2005, Schneider filed a first amended cross-complaint for (1) breach of written lease agreement, (2) conversion, (3) battery, (4) intentional infliction of emotional distress, (5) equitable indemnity, and (6) declaratory relief. She dismissed the cross-complaint at some point during trial.

[6] *Walton v. Walton* (1995) 31 Cal.App.4th 277, 287 (there is no constitutional right to a jury trial in a specific performance action even where there are legal issues regarding the contract sought to be enforced).

option to purchase, the purchase price shall be $265,000.00 *****" In the blank space between pre-printed paragraphs 20 and 21, the following appears in typewriter font: ". . para. 19 continued. Landlord agrees to apply the sum of $100.00 per month from each rent payment towards the down payment, the total sum to be part of the purchase price." After paragraph 21, there are signatures of Schneider, Moroz, and Konvisor, all dated "10/24/01." Below the signatures is the following handwritten sentence: "—Tenant is responsible for properly taking care of Jacuzzi and properly cultivating the lawns, shrubbery, trees and grounds."

Moroz and Konvisor presented one version of events leading up to the execution of this Lease, while Schneider presented a starkly different version.[7] Moroz testified that when he initially visited the Property, he did not want to lease it because of its dilapidated condition. As an incentive, Schneider offered him an "option to buy" the Property at a future time. Moroz, an accountant and the president of an accounting and payroll firm, had never heard the term "option to buy." Schneider briefly explained that an "option to buy" meant that he would have a right to buy the Property after leasing it for a period of time. Believing that Schneider's sale price ($265,000) was fair, Moroz agreed to lease the property only because he wanted the option to buy it at a later time.

According to Moroz, with the exception of the handwritten sentence below the signatures, Schneider presented him with the fully completed Lease. He testified that Schneider wrote in the provision about care for the Jacuzzi and landscaping after he asked about which party would be responsible for caring for those items. Moroz, Konvisor, and Schneider signed both copies of the Lease, and each side kept one copy.

Moroz further testified that in 2002, he and Konvisor spent approximately $15,000 remodeling the Property, including repainting, installing hardwood floors, and patching the roof, all in reliance on the fact that he had an option to purchase the Property. According to Moroz, he did not have any receipts, invoices, or cancelled checks

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[7] We note that a significant portion of Schneider's testimony was not about the Property or the Lease, but about how she was being tortured by various individuals, including Donald Trump and Michael Jackson.

documenting his payment for these repairs because they were contained in a box that he lost when moving out of the Property. Konvisor testified that receipts did not exist for many of the repairs she and Moroz made to the Property because they paid in cash.

Schneider, on the other hand, testified that prior to the day she met with Moroz and Konvisor to sign the Lease, she had purchased a standard form lease from a local stationary store. When Schneider met with Moroz, however, he presented her with the already completed Lease and asked her to sign that one instead.[8] Schneider agreed. She then made one copy for herself and returned the original to Moroz. Sometime later, Moroz informed her that he needed a copy of the Lease for Mishele's school. Believing that Moroz had misplaced his copy of the Lease, Schneider gave him her copy without making an additional copy. Moroz never returned her copy. Schneider testified that she did not recall offering to sell the Property to Moroz, nor did she recall seeing the typed option provision in the Lease when she signed it.

Schneider's Mental Capacity. At trial, the parties also presented contrasting portraits of Schneider's mental health through expert testimony.

James Rosenberg, M.D., a psychiatrist, testified on behalf of Schneider. Rosenberg treated Schneider from April 2001 until sometime in 2002, and then resumed treatment in December 2004. During this period of time, Schneider was involuntarily detained at a psychiatric facility at least five times.[9] In Rosenberg's encounters with

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[8] The lease Schneider claims she brought is a different standard pre-printed lease. It is entitled "Rental Agreement (Month-To-Month Tenancy)" and has fill-in-the-blank lines for the names of the parties, the address of the premises, and the monthly rent amount. Notably, there is a pre-printed sentence in the lease that allows the parties to decide who is "to properly cultivate, care for, and adequately water the lawn, shrubbery, trees, and grounds." This pre-printed language tracks the handwritten language in the Lease.

[9] Schneider was detained pursuant to Welfare and Institutions Code section 5150, which provides: "When any person, as a result of mental disorder, is a danger to others, or to himself or herself, or gravely disabled, a peace officer, member of the attending staff, as defined by regulation, of an evaluation facility designated by the county, designated members of a mobile crisis team, . . . or other professional person designated by the county may, upon probable cause, take, or cause to be taken, the person into

Schneider, she typically was screaming and delusional, and she often spoke of demons and other entities eating her organs. Rosenberg diagnosed Schneider with an "ongoing, poorly-controlled major mental disorder, either schizoaffective disorder, which refers to a combination of schizophrenia and a mood disorder, or chronic paranoid schizophrenia, with a secondary depressive disorder." Rosenberg testified that Schneider had "hallucinations," "bizarre delusional thinking," and "very impaired judgment." According to Rosenberg, who had practiced psychiatry for over 15 years by the time of trial, Schneider had "one of the most severe cases of a schizophrenia type disorder" that he had ever treated.

When asked how Schneider's mental condition affected her cognitive abilities, Rosenberg testified that schizophrenia permanently damages a person's brain and that with Schneider, he saw a person with a "markedly impaired thought process," "a lack of logical thinking," a "lack of being able to sustain attention and concentrat[ion]," and "impaired judgment." When asked whether he believed Schneider could have written the option provision contained in the Lease, Rosenberg testified that "with reasonable medical certainty," Schneider could neither understand the Lease as a whole, nor could she generate the type of "technical, legal phrases" contained in the option provision.

Deborah Cresswell, Ph.D., a psychologist, testified on behalf of Dayco. Cresswell, who did not meet with Schneider, but reviewed her available medical records, testified that Schneider exhibited the ability to understand the concept of leasing her property and acted in a purposeful, goal-oriented way. Cresswell noted that Schneider's ability to seek counsel to evict her prior tenant and refinance the Property to lower her mortgage payments reflected "thoughtful decisions" that did not suggest marked cognitive impairment or functioning. When asked whether she believed Schneider had the ability to prepare the option provision in the Lease, Cresswell testified that she did not know the answer to that question.

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custody and place him or her in a facility designated by the county and approved by the State Department of Mental Health as a facility for 72-hour treatment and evaluation."

### IV. The Judgment and Subsequent Proceedings.

On December 4, 2006, the trial court entered judgment in favor of Schneider. In its detailed statement of decision, the trial court reviewed all of the evidence presented at trial and concluded that Moroz and Konvisor had inserted the option provision after Schneider had signed the Lease and therefore, no basis existed for specific performance. The court noted that "in every dispute in which the parties disagree diametrically, the parties' credibility is critical" and it simply did "not believe Moroz's and Konvisor's testimony on these central issues." On the other hand, the trial court noted, although Schneider's "testimony was marred by outbursts . . . the court did not find her testimony to be made up with respect to any matter in issue."

As an alternative to its finding that Moroz and Konvisor had inserted the option provision after Schneider signed the Lease, the court found that Schneider "did not have the mental capacity to understand and consent to the option provision" and thus even "[if] she had signed such a contract (again, contrary to the court's findings above), the court would rescind it."

Dayco moved for a new trial and the court denied the motion. Schneider moved for attorney fees based on the attorney fees provision in the Lease. The trial court denied the motion, ruling: "The provision in the lease agreement is limited to the terms of the tenancy and does not include an action [on] the inserted provision supposedly being an option to purchase."

Dayco timely appealed from the judgment in favor of Schneider. Schneider timely appealed from the post-judgment order denying attorney fees.

## DISCUSSION

### I. Judicial Bias.

Dayco complains that the trial court pre-judged the issue of Schneider's mental capacity during the default proceedings, and carried over its judgment into the subsequent trial. Schneider's mental capacity, according to Dayco, was "*the very matter* that the

court had to decide later at trial." Dayco contends this lack of impartiality is grounds for reversal.

A court engages in misconduct if it makes persistent disparaging or discourteous comments about a party, lawyer or witnesses, conveying the impression they are not trustworthy or the case lacks merit. (*People v. Fudge* (1994) 7 Cal.4th 1075, 1107 (*Fudge*).) The conduct is viewed under an objective standard to determine whether a reasonable person would entertain doubts about the court's impartiality. (*Hall v. Harker* (1999) 69 Cal.App.4th 836, 841 (*Hall*), disapproved on another ground by *Casa Herrera, Inc. v. Beydoun* (2004) 32 Cal.4th 336, 349.) Judicial bias or prejudice consists of a mental attitude or disposition regarding a party. When reviewing a claim of bias, "'the litigants' necessarily partisan views should not provide the applicable frame of reference. [Citations.]'" (*Roitz v. Coldwell Banker Residential Brokerage Co*. (1998) 62 Cal.App.4th 716, 724.) Bias and prejudice must be clearly established. "Neither strained relations between a judge and an attorney for a party nor '[e]xpressions of opinion uttered by a judge, in what he conceived to be a discharge of his official duties, are . . . evidence of bias or prejudice. [Citation.]'" (*Ibid*.) The appellant has the burden of establishing facts supporting a claim of judicial bias (*Betz v. Pankow* (1993) 16 Cal.App.4th 919, 926), and showing prejudice. (See *Fudge*, *supra*, 7 Cal.4th at p. 1109.) After scrutinizing the alleged judicial misconduct, we conclude that Dayco has failed to show either bias or prejudice.

First, the conduct of Dayco's counsel during the proceedings below belies its present claim that the trial court evidenced bias in the pretrial hearings. On September 8, 2005, at a status conference, the trial court indicated that it would need to reschedule the trial, which it had calendared for the following week. Because Schneider's counsel had another trial scheduled for late October, he asked if the trial could be transferred to another judge. Dayco's counsel protested, stating: "Your Honor . . . I personally, only because you were here for the original default prove up, would rather you be the trial judge." After some discussion, the parties and court agreed the trial could take place in

early October. If Dayco had harbored any doubts about the court's impartiality, it is highly unlikely it would have taken steps to avoid a transfer of the case to another judge.

Moreover, the portions of the default proceedings cited by Dayco in which the trial court expressed its concerns that Schneider had not responded to the papers demonstrate the court's concern that Schneider receive proper notice before being saddled with a default judgment forcing her to sell her home. They do not, as Dayco contends, demonstrate Dayco was prevented from a having a fair trial. In short, we find absolutely nothing in the record that would lead a reasonable person to entertain doubts about the trial court's impartiality. (*Hall, supra*, 69 Cal.App.4th at p. 841.)

Second, Dayco has failed to show any prejudice. The trial court's decision was not based on Schneider's mental capacity, but rather on the court's finding that Moroz and Konvisor inserted the option provision after the Lease was signed. To the extent the trial court provided an alternative basis for its decision, namely, that Schneider lacked the mental capacity to understand and consent to the option provision, we reject the notion that the trial court pre-determined this issue based on the default proceedings. Rather, it is apparent that the trial court based its alternative holding on the overwhelming evidence presented at trial that Schneider lacked the ability to construct or even understand the option provision in the Lease.[10] (*Fudge, supra*, 7 Cal.4th at p. 1109.)

## II. Relief Pursuant to Code of Civil Procedure Section 473.

Dayco contends that, at a hearing on November 29, 2004, the trial court "compelled" counsel for Dayco to waive the six-month statutory deadline for seeking relief under Code of Civil Procedure section 473. Our reading of the record does not support this contention.

The purpose of the November 29, 2004 hearing was to allow the trial court to hear the investigative findings of Ingham, the appointed Evidence Code section 730 expert, as

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**10** The substantial evidence that supports the trial court's findings as to both the Lease and Schneider's mental capacity is discussed in more detail in Section III, below.

to Schneider's competence. Ingham explained to the court that he was not able to review Schneider's medical records but that he learned through official channels that she had been recently placed on an involuntary hold at a psychiatric facility. Ingham explained that despite numerous attempts at contacting Schneider, he had been unable to speak with her. In response to Ingham's report, the court stated the following: "There are at least two issues. One is whether she was competent at the time she signed the lease and secondly, whether she was competent when she was served." The court indicated its inclination to set aside the default judgment under its inherent authority to do so, and Dayco's counsel urged him not to. As an alternative to setting aside the default judgment, the court offered Dayco's counsel the opportunity to "waive the six-month requirement under 473 for vacating the judgment." Dayco's counsel readily agreed, stating: "I would be willing to do that if that is what the issue is." Indeed, he noted that he did not think waiving the deadline was even necessary because he believed the statute of limitations would be tolled during Schneider's "lack of capacity."

Thus, it is clear from the record that Dayco willingly agreed to extend the deadline for filing a motion to set aside the default judgment because in its view, it was the most prudent way to convince the trial court that its default judgment was valid. Dayco cannot now be heard to challenge the court's extension of the six-month deadline on appeal.[11]

## III. Substantial Evidence Supports the Judgment.

Dayco contends the evidence does not support the judgment. Specifically, it challenges the trial court's findings that (1) Moroz and Konvisor inserted the option

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[11] In its opening brief, Dayco limited its challenge to the trial court's extension of the deadline for filing a motion to vacate the default judgment. In its reply brief, however, Dayco challenged the merits of the trial court's ruling setting aside the default judgment after the motion was filed. We decline to address Dayco's challenge to the merits of the ruling because Dayco raised the issue for the first time in its reply brief, and failed to show good cause as to why it did not raise the issue earlier. (*Scott v. CIBA Vision Corp.* (1995) 38 Cal.App.4th 307, 322 ["We do not entertain issues raised for the first time in a reply brief, in the absence of a showing of good cause why such issues were not raised in the opening brief"].)

provision after the parties signed the Lease and (2) Schneider lacked the mental capacity to agree to the option provision.

The standard of review utilized by an appellate court addressing an argument of insufficiency of the evidence is well established. "In reviewing the evidence on such an appeal[,] all conflicts must be resolved in favor of the respondent, and all legitimate and reasonable inferences indulged in to uphold the verdict if possible. It is an elementary, but often overlooked principle of law, that when a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury." (*Crawford v. Southern Pacific Co*. (1935) 3 Cal.2d 427, 429.) Substantial evidence is evidence of """ponderable legal significance . . . reasonable in nature, credible, and of solid value."""" (*Ofsevit v. Trustees of Cal. State University & Colleges* (1978) 21 Cal.3d 763, 773, fn. 9.) The same standard of review applies to a trial court's findings following a bench trial. (*Clark v. City of Hermosa Beach* (1996) 48 Cal.App.4th 1152, 1178, fn. 27.)

Substantial evidence supports the trial court's finding that Moroz and Konvisor inserted the option provision after the parties signed the lease. For instance, even though the option provision was the most important term in the Lease for Moroz, Moroz testified he agreed to sign the Lease without discussing any details of the agreement such as how the escrow would take place, which party would be responsible for closing costs, whether the seller could encumber the property with liens before the option was exercised. The court found this testimony "strange," given it was "the presence of the provision that was critical to them in the rental agreement."

Furthermore, the court concluded "there was no good explanation" for why the option provision was "scattered among the pre-printed terms of the rental agreement," unless the person who inserted the provision "did [so] to insure that the option provision was above the signature line," which "would suggest that the option provision was added after the Residential Lease Agreement was signed." The court found the testimony by Moroz and Konvisor generally lacking in credibility because "[d]espite their accounting

training," neither Moroz nor Konvisor could produce one receipt, invoice, or check for any of the multiple and expensive repairs they claimed to have made on the Property."

In addition, Schneider testified that she did not recall offering to sell her home to Moroz and Konvisor. She further testified that she did not prepare the Lease, and that she did not recall seeing the option provision in the Lease when she signed it. Rosenberg testified Schneider did not have the cognitive ability to construct the option provision. This evidence, which the trial court was entitled to believe, supports the finding that Moroz and Konvisor, and not Schneider, inserted the option provision after the parties signed it.

Substantial evidence also supports the trial court's finding that Schneider did not have the mental capacity to understand and consent to the option agreement. Rosenberg, who treated Schneider for years, testified that schizophrenia causes brain damage and that Schneider had one of the most severe cases of schizophrenia ever encountered in his career. He also testified that Schneider's judgment was impaired and her thought processes illogical. Finally, he testified to a reasonable degree of medical certainty that she was incapable of constructing and/or understanding the option provision in the Lease. Although Dayco presented evidence that she was able to find counsel to pursue an unlawful detainer action, place the Property on internet rental sites, make complaints about her former tenant to his professional organization, and find a purchaser for her car, the trial court was entitled to view this evidence as irrelevant to the issue of her mental capacity to enter into a complicated legal transaction.

As we understand it, Dayco argues that Rosenberg's testimony did not constitute substantial evidence to support the trial court's finding because it was insufficient to overcome the presumption under Probate Code section 810, subdivision (a), that Schneider had the mental capacity to agree to the option provision.[12] But Probate Code section 810, subdivision (c) expressly permits a trial court to make "a judicial

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[12] That section provides: "[T]here shall exist a rebuttable presumption affecting the burden of proof that all persons have the capacity to make decisions and to be responsible for their acts or decisions."

determination" that a person does not have "the legal capacity to perform a specific act," such as knowingly enter into an option agreement for real property, "based on evidence of a deficit in one or more of the person's mental functions." As recited above, Rosenberg testified that Schneider had deficits in multiple mental functions, such as impaired judgment, illogical thinking, and the inability to sustain attention or concentration. Thus, the trial court was entitled to rely on Rosenberg's testimony in making its judicial determination regarding Schneider's mental capacity.

## IV. Additional errors alleged by Dayco.

Subsumed under its discussion of judicial bias, Dayco summarily lists a number of evidentiary rulings made by the court that it contends resulted in prejudicial error without citations to the Evidence Code, or any other legal authority. We deem Dayco's challenges to these rulings waived. (*In re Daniel M.* (2003) 110 Cal.App.4th 703, 708 [appellant waives an issue which is undeveloped and includes no citation to supporting legal authority].)

## V. Schneider's motion for attorney fees.

Schneider appeals from the trial court's post-judgment order denying her motion for attorney fees. She bases her request for attorney fees on the following provision in the Lease:

> "ATTORNEY FEES: In the event that legal action is undertaken by any party to enforce the terms of this lease or to recover possession of the premises, the prevailing party shall be entitled to recover from the other party all costs incurred in connection with such action, including reasonable attorney fees and collection costs, with or without suit."

"On appeal this court reviews a determination of the legal basis for an award of attorney fees de novo as a question of law." (*Sessions Payroll Management, Inc. v. Noble Construction Co.* (2000) 84 Cal.App.4th 671, 677.)

Civil Code section 1717, subdivision (a) provides: "In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs." To further the statute's goal of mutuality, "the statute generally must apply in favor of the party prevailing on a contract claim whenever that party would have been liable under the contract for attorney fees had the other party prevailed." (*Hsu v. Abbara* (1995) 9 Cal.4th 863, 870-871 (*Hsu*).)

"[I]n deciding whether there is a 'party prevailing on the contract,' the trial court is to compare the relief awarded on the contract claim or claims with the parties' demands on those same claims and their litigation objectives as disclosed by the pleadings, trial briefs, opening statements, and similar sources." (*Hsu, supra*, 9 Cal.4th at p. 876.) "The prevailing party determination is to be made only upon final resolution of the contract claims and only by 'a comparison of the extent to which each party ha[s] succeeded and failed to succeed in its contentions.'" (*Ibid.*)

When the decision on a litigated contract claim "is purely good news for one party and bad news for the other—the Courts of Appeal have recognized that a trial court has no discretion to deny attorney fees to the successful litigant." (*Hsu, supra*, 9 Cal.4th at p. 876.) "Thus, when a defendant defeats recovery by the plaintiff on the only contract claim in the action, the defendant is the party prevailing on the contract under [Civil Code] section 1717 as a matter of law." (*Ibid.*) It is only when the results of the litigation are "mixed" that the statute "reserve[es] [to] the trial court a measure of discretion to find no prevailing party[.]" ( *Ibid.*)

Here, Dayco's primary objective throughout the litigation, both during the default proceedings and at trial, was enforcement of the option provision in the Lease through specific performance. By the end of the litigation, Dayco failed to obtain this objective. The trial court refused to enforce the option provision, refused to order specific performance, and entered judgment in Schneider's favor. Schneider, on the other hand,

obtained a "'simple, unqualified win'" and the judgment in her favor was "purely good news" for her. (*Hsu, supra*, 9 Cal.4th at p. 876.) Schneider was undoubtedly the prevailing party in the litigation and was thus entitled to attorney fees. (*On v. Cow Hollow Properties* (1990) 222 Cal.App.3d 1568, 1574 [party who successfully defends against a claim for specific performance is entitled to attorney fees as provided in the underlying real estate contract].)

We find no support for the trial court's conclusion that Schneider is not entitled to attorney fees because the Lease was "limited to the terms of the tenancy." Even though the trial court found the option provision was not an original part of the Lease, "[i]t is now settled that a party is entitled to attorney fees under section 1717 'even when the party prevails on grounds the contract is inapplicable, invalid, unenforceable or nonexistent, if the other party would have been entitled to attorney's fees had it prevailed.'" (*Hsu, supra*, 9 Cal.4th at p. 870.) Here, even though the trial court found that the option provision was invalid because Moroz and Konvisor inserted it after the Lease was signed, Moroz and Konvisor sued for specific performance based on this very provision. Had the trial court concluded that the option provision was valid, Moroz and Konvisor would have been entitled to attorney fees based on the Lease's provisions.[13] Mutuality under Civil Code section 1717 dictates that Schneider is entitled to her attorney fees. (See *Care Construction, Inc. v. Century Convalescent Centers, Inc*. (1976) 54 Cal.App.3d 701, 705-706 disapproved on unrelated grounds in *Canal-Randolph Anaheim, Inc. v. Wilkoski* (1978) 78 Cal.App.3d 477, 497 [where underlying lease contains attorney fees provision and defendant successfully defends based on argument that lease is unenforceable, prevailing defendant is still entitled to attorney fees].)

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**13** Dayco argues that the trial court's ruling denying Moroz's and Konvisor's attorney fees during the default proceedings precludes the possibility that Schneider could obtain attorney fees after trial. However, to the extent we disapprove of the trial court's reasoning for denying attorney fees to Schneider, it is irrelevant that the trial court used the same reasoning earlier to deny attorney fees to the other side.

**VI. Dayco's motion to augment.**

Schneider moves this court to augment the record with documents lodged by the parties, but not included in the Clerk's Transcript. We grant the motion to augment. (Cal. Rules of Court, rule 8.155, subd. (a) ["(1) At any time, on motion of a party or its own motion, the reviewing court may order the record augmented to include: (A) Any document filed or lodged in the case in superior court"].)

## DISPOSITION

The judgment is affirmed, the post-judgment order denying attorney fees is reversed, and the matter is remanded for further proceedings pursuant to this decision. Schneider shall recover her costs on appeal.

NOT TO BE PUBLISHED.

TUCKER, J.*

We concur:

MALLANO, P. J.

ROTHSCHILD, J.

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* Judge of the Orange County Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.